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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GOLTHA GREEN, Plaintiff and Appellant, v. RICHARD SWEENEY et al., Defendants and Respondents.	B283215 (Los Angeles County Super. Ct. No. BC548724)

APPEAL from judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Law Office of Freddie Fletcher and Freddie Fletcher, for Plaintiff and Appellant.

Kjar, McKenna & Stockalper, James Kjar, Ryan Deane, and Jon Schwalbach, for Defendants and Respondents.

Plaintiff and appellant Goltha Green appeals from a judgment of dismissal following an order sustaining the demurrer of defendants and respondents Richard Sweeney and Preferred Realty Advisors, Inc., without leave to amend, in this action for aiding and abetting wrongful foreclosure. In the underlying foreclosure proceedings, the foreclosure court[1] appointed Sweeney to act as receiver and authorized him to hire Preferred. In this case, Green alleges that the order confirming Sweeney's appointment was void, because the foreclosure court did not have jurisdiction at the time of appointment, due to the filing of a bankruptcy case. The trial court in this case found the doctrine of res judicata barred Green from bringing a claim that he could have litigated in the foreclosure proceedings. On appeal, Green contends the foreclosure court did not have jurisdiction to confirm the appointment of the receiver, but does not address the foreclosure court's jurisdiction to adjudicate any claims Green had against Sweeney and Preferred, nor does Green address the issue of res judicata. We conclude the trial court correctly determined the cause of action for wrongful foreclosure is barred by the doctrine of res judicata, because Green was a party to the foreclosure proceedings appointing Sweeney as receiver and authorizing him to hire Preferred, Green's claim against Sweeney and Preferred

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[1] We use the term "foreclosure court" to refer to the trial court that heard the underlying foreclosure proceedings, and to distinguish it from references to the trial court in this subsequent case for wrongful foreclosure.

arises from the same facts as in the prior litigation, and the claim could have been litigated in the underlying actions. The judgment is affirmed.[2]

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the relevant facts as alleged in Green's complaint,[3] together with matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

The Prior Actions

Green owned four apartment buildings in Los Angeles. He had six commercial loans secured by deeds of trust on his properties, which were held by JPMorgan Chase Bank (Bank) as the successor to Washington Mutual Bank. In July 2010, the Bank issued delinquency notices for five of the loans, stating that Green was in default. Repayment of

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[2] Green did not seek leave to file a fourth amended complaint, so we need not consider whether the court should have granted leave to amend. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 ["plaintiff has the burden of proving that an amendment would cure the defect"].)

[3] We limit our factual recitation to facts relating to the allegations against Sweeney and Preferred. The operative complaint names numerous additional defendants who are not parties to this appeal.

all the loans was accelerated for failure to make payment. On December 6, 2010, the trustee recorded notices of default on behalf of the Bank for each of Green's six loans, initiating non-judicial foreclosures.

On December 27 and 28, 2010, the Bank filed judicial foreclosure proceedings against Green under four civil case numbers, one for each of Green's four properties. On December 29, 2010, upon application of the Bank, the foreclosure court: issued ex parte orders appointing Sweeney as receiver in each case; issued temporary restraining orders that authorized Sweeney, among other powers, to employ the management company Preferred to immediately take possession of, and manage the properties, collect income from them, care for the properties, and incur expenses for that care; and ordered Green to turn over possession of the properties immediately.

The foreclosure court also issued an order to show cause directed to Green as to why the receiver should not be confirmed at a hearing scheduled for January 19, 2011. By their terms, the ex parte orders were to expire at the time of the scheduled hearing, unless extended by the foreclosure court. The hearing date was continued to February 10, 2011.

George Bivens, a non-party to the foreclosure actions, filed a notice of removal of the four foreclosure actions in United States Bankruptcy Court on January 24, 2011. A copy of the notice was delivered to the foreclosure court that same day.

On February 10, 2011, the foreclosure court continued the hearing on the order to show cause to confirm the receiver to February 23, 2011. On February 23, 2011, the foreclosure court struck the filing of the notice of removal by Bivens because he lacked standing. The foreclosure court confirmed the receiver's appointment.

Green and his family received treatment from Preferred's resident manager, approved by Sweeney and affirmed by the Bank, which Green considered to create a hostile living environment.

On April 14, 2011, the bankruptcy court found the foreclosure actions were improperly removed and remanded them to the foreclosure court. The Bank filed a notice of the bankruptcy court order in the foreclosure court on April 18, 2011.

On May 10, 2011, the trustee recorded notices of sale to be held on May 31, 2011. On May 25, 2011, another notice of removal of the foreclosure actions was filed in bankruptcy court in the bankruptcy case of third party Youth Intervention Programs, Inc. A notice of the removal was filed with the foreclosure court on May 26, 2011 and the trustee's sale was postponed. On June 1, 2011, the bankruptcy court dismissed the proceeding in Youth Intervention Programs, Inc., finding that the actions had been improperly removed.

The trustee's sale was held on June 15, 2011. On June 16, 2011, the trustee executed six trustee deeds granting the properties to CRP Properties, Inc., which is an affiliate of the

Bank. The Bank also executed assignments of the six notes and deeds of trust to CRP. Sweeney turned over possession of the properties to CRP. The Bank and CRP hired Preferred as the property manager.

On October 19, 2011, the Bank filed a motion to approve the receiver's final account and discharge the receiver. The foreclosure court held a hearing on the Bank's motion on November 16, 2011. Green filed a motion to vacate and set aside the appointment of the receiver as void. He also filed a notice of his intent to file a motion to vacate and set aside a different order authorizing the receiver to employ legal counsel. The foreclosure court stated that the motions were untimely, because Green was objecting to orders that had been entered several months earlier. Green argued that the orders were void and a motion based on lack of standing could be raised at any time, even on appeal. Since one of Green's motions had not been filed yet, the foreclosure court decided not to advance the motions and rule on them that day. The foreclosure court issued orders approving the receiver's final account and report, discharging the receiver, and dissolving the preliminary injunction. The foreclosure court dismissed the foreclosure actions, but retained jurisdiction over the receivership.

On January 17, 2012, Green filed a notice of appeal from the orders authorizing the receiver to employ legal counsel and the November 16, 2011 order approving the receiver's final accounting. A hearing in the foreclosure court on Green's motions to vacate the appointment of the

receiver and the authorization to employ counsel was taken off calendar, and Green filed a notice of intent to file the motions again at a later date. The appellate court sent a notice of default in February 2012, and subsequently dismissed Green's appeal.

On March 9, 2012, Green filed an application for an order vacating and setting aside the order authorizing the receiver to obtain legal counsel. Green withdrew the application a few months later.

The Wrongful Foreclosure Action

On June 16, 2014, Green filed the present action for wrongful foreclosure against several defendants. Green filed a second amended complaint on August 5, 2015, which included a single cause of action against Sweeney and Preferred for wrongful foreclosure. Sweeney and Preferred filed a demurrer, which the trial court granted with leave to amend. In its written order, the trial court stated that Green's allegations against Sweeney and Preferred concerned only activities that they conducted "within the course and scope of the receiver's employment by the [foreclosure] court," and that the foreclosure court's discharge operated as res judicata as to any claims of liability against them. To the extent that Green argued Sweeney was liable for "work done outside of the receivership," the trial court noted there was no connection with the cause of action for wrongful foreclosure and found

the allegations to be "uncertain." The trial court gave 10 days' leave to amend, limited to amendments to address the "uncertainty with regard to the actions for which [Sweeney and Preferred] is being sued."

Green filed the operative third amended complaint against the Bank, Sweeney, Preferred and numerous other defendants. The sole cause of action alleged against Sweeney and Preferred was for wrongful foreclosure. The complaint alleged: the Bank filed an ex parte application on December 29, 2010, for appointment of a temporary receiver in each of the foreclosure actions, nominating Sweeney as the receiver and requesting authority for Sweeney to hire Preferred to manage the properties. The foreclosure court issued an ex parte order appointing Sweeney as a temporary receiver, authorizing the hiring of Preferred, restraining Green from interfering with the receiver, and setting an order to show cause as to why a receiver should not be confirmed. On January 24, 2011, prior to the hearing on the order to show cause, bankruptcy debtor Bivens filed a notice of removal of the four foreclosure actions to bankruptcy court. The foreclosure court had no jurisdiction to act after the foreclosure actions were removed to bankruptcy court on January 24, 2011. The removal transformed all of the foreclosure court's orders into federal court orders. Since the federal court did not continue the order to show cause to confirm the receiver's appointment, it expired. The foreclosure court confirmed Sweeney's appointment as a receiver on February 23, 2011, in the absence of jurisdiction.

Therefore, the confirmation of the receiver was void, and the receiver's possession of the properties was a trespass. The receiver's collection of rents constituted conversion. The unlawful possession and conversion aided and abetted the Bank's wrongful foreclosure and provided substantial assistance to the Bank by depriving Green of the rents and control over the properties. As a proximate result, Green was damaged.

Sweeney and Preferred filed a demurrer, which was heard on September 23, 2016. The trial court sustained the demurrer without leave to amend. On April 17, 2017, the trial court entered an order of dismissal. The trial court found that the operative complaint failed to state facts sufficient to state a cause of action, and that Green's claims were barred by both collateral estoppel and judicial immunity. Green filed a timely notice of appeal on June 14, 2016.

DISCUSSION

Standard of review

We apply a de novo standard of review on appeal from an order sustaining a demurrer. "[W]e exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] First, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Stearn v. County of*

San Bernardino (2009) 170 Cal.App.4th 434, 439 (*Stearn*).) "We accept as true all properly pleaded material factual allegations of the complaint and other relevant matters that are properly the subject of judicial notice, and we liberally construe all factual allegations of the complaint with a view to substantial justice between the parties." (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919.) "Then we determine whether the complaint states facts sufficient to constitute a cause of action." (*Stearn, supra*, at p. 439.) "We do not, however, assume the truth of contentions, deductions, or conclusions of law." (*Id.* at p. 440.)

Claim Preclusion

Green contends that Sweeney and Preferred had no authority to act, because the foreclosure court lacked jurisdiction to confirm the receiver's appointment and the temporary order of appointment expired. As a result, Green argues, actions taken in the role of receiver aided a wrongful foreclosure of Green's properties. Even assuming Green's arguments about infirmities in the receiver's appointment are correct, we agree with the trial court that Green is barred by the doctrine of res judicata from pursuing the wrongful foreclosure claim against Sweeney and Preferred. Green was a party to the foreclosure actions, and all of the claims he now raises could have been litigated in the foreclosure actions in connection with the receiver's final

accounting. Therefore, Green is barred from raising the claims in this second action.

The doctrine of res judicata has two aspects—claim preclusion and issue preclusion.[4] (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) "*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it

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[4] Issue preclusion, historically referred to as collateral estoppel, "prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).) The doctrine applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id.* at p. 825.) The doctrine differs from claim preclusion because it is a conclusive determination of issues, but does not bar a cause of action. (*Ibid.*) Even if the minimal requirements for issue preclusion are satisfied, courts will not apply the doctrine if policy considerations outweigh the doctrine's purpose in a particular case. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342–343.) Given that we resolve this case on the grounds of claim preclusion, we do not address issue preclusion.

operates to bar relitigation of the claim altogether." (*Id.* at p. 824; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).) The claim is precluded if the cause of action could have been brought in the prior action, whether or not it was actually asserted or decided. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974.) The doctrine promotes judicial economy and avoids piecemeal litigation by preventing a plaintiff from "'"splitting a single cause of action or relitigat[ing] the same cause of action on a different legal theory or for different relief."'" (*Mycogen*, *supra*, at p. 897.)

"'Two proceedings are on the same cause of action if they are based on the same "primary right." [Citation.] The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based. [Citation.] . . . [¶] An injury is defined in part by reference to the set of facts, or transaction, from which the injury arose.' (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.)" (*Crosby v. HLC Properties, Ltd.* (2014) 223 Cal.App.4th 597, 603.) "'[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal*

ground for relief." [Citations.]' Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954.)" (*Boeken v. Phillip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798.)

"Res judicata bars not only issues that were raised in the prior suit but related issues that could have been raised." (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 569 (*Villacres*).) """The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.'" [Citation.] '[R]es judicata benefits both the parties and the courts because it "seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*."' (*Mycogen*[, *supra*,] 28 Cal.4th [at p.] 897.)" (*Id.* at p. 575.)

"""If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it . . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in

consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. . . .'" [Citation.] [¶] 'The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, "litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background." . . . ". . . [U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . '. . . [A]n issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result . . . .'" [Citation.]" (*Villacres*, *supra*, 189 Cal.App.4th at p. 576.)

In general, "'A receiver is an agent and officer of the court, and is under the control and supervision of the court. ([Code Civ. Proc.,] § 568; Cal. Rules of Court, rule 3.1179.)' (*City of Chula Vista v. Gutierrez* (2012) 207 Cal.App.4th 681, 685 (*City of Chula Vista*).) 'The receiver is an agent of the

court and not of any party, and as such: (1) Is neutral; [¶] (2) Acts for the benefit of all who may have an interest in the receivership property; and [¶] (3) Holds assets for the court and not for [any party].' (Cal. Rules of Court, rule 3.1179(a); see *Lesser & Son v. Seymour* (1950) 35 Cal.2d 494, 499.) The receiver is obligated to preserve and manage the property during the course of the receivership. (*Title Ins. & Trust Co. v. Calif. etc Co.* (1911) 159 Cal. 484, 492.)" (*Southern California Sunbelt Developers, Inc. v. Banyan Limited Partnership* (2017) 8 Cal.App.5th 910, 922 (*Southern California Sunbelt*).)

"Before the court rules on the final accounting, the parties may question, and the court must consider, issues such as whether the receiver exceeded his or her authority, caused injury to others, or acted negligently in operating the receivership estate. '[U]pon the receiver's final report and account, the receiver in his personal capacity may be surcharged for losses to the receivership estate based upon his misconduct or mismanagement.' (*Aviation Brake Systems, Ltd. v. Voorhis* (1982) 133 Cal.App.3d 230, 235 (*Aviation Brake Systems*).) 'It is of course an indispensable part of the receiver's duties to file an accounting and submit himself [or herself] to inquiry and attack by those beneficially interested in the estate.' (*Macmorris Sales Corp. v. Kozak* (1967) 249 Cal.App.2d 998, 1005.)" (*Southern California Sunbelt, supra,* 8 Cal.App.5th at p. 926.)

In *Aviation Brake Systems*, a corporation sued Voorhis, who had acted as a receiver in prior litigation over control of

the corporation, for damages arising out of Voorhis's failure to discharge his duties faithfully. The trial court sustained a demurrer, and the appellate court affirmed, stating: "We hold the trial court properly sustained the demurrer on the ground of res judicata. We conclude that the matters sought to be litigated in the present action were, could have been, or should have been litigated at the time the receiver's final report and account was approved, and that the court's order in the prior case approving the account, which has become final, may not be collaterally attacked in this proceeding." (*Aviation Brake Systems*, *supra*, 133 Cal.App.3d at p. 234.) In determining that the corporation's claims were barred by res judicata, the *Aviation Brake Systems* court expressly rejected the corporation's argument that "the only issue involved in an approval of a receiver's final report and accounting are the liabilities of the receiver as such, in his official capacity," and that the final accounting "has nothing to do with fixing the liability of the receiver personally for his misconduct or mismanagement of the receivership estate." (*Ibid.*) The court explained that "upon the receiver's final report and account, the receiver in his personal capacity may be surcharged for losses to the receivership estate based upon his misconduct or mismanagement" and barred claims by the corporation against Voorhis in a subsequent case that "could and should have been raised as objections to the receiver's final report and account." (*Id.* at p. 235.)

"A party cannot file an independent action to address the receiver's liability in mismanaging the assets . . . . Instead, a party must immediately appeal from the order approving the final accounting because issues with the receiver concern matters collateral to the underlying lawsuit. (*Macmorris Sales Corp. v. Kozak*, *supra*, 249 Cal.App.2d 998, 1002 [final accounting order appealable as final judgment 'determining matters which are collateral to the main case'].) In summary, the last chance to challenge the receiver's actions, management, and omissions is at the time of the final accounting because the provisional receivership remedy is collateral to the main case." (*Southern California Sunbelt, supra,* 8 Cal.App.5th at pp. 926–927.) An order approving the final account of the receiver is an appealable final order. (*Schreiber v. Ditch Road Investors* (1980) 105 Cal.App.3d 675, 677, fn.1.)

Green's focus on whether the foreclosure court had been temporarily divested of jurisdiction by the bankruptcy court during the time the foreclosure court appointed Sweeney is beside the point. Regardless of the court's jurisdiction at that time, Sweeney and Preferred managed the properties at the direction of the foreclosure court, and Green's claim that Sweeney and Preferred aided and abetted a wrongful foreclosure arise from the actions taken for that court. Green fully participated in the foreclosure proceedings and, like the plaintiff in *Aviation Brake Systems*, had a full opportunity to raise any claims based on misconduct or mismanagement against the receiver at the

hearing on the receiver's final report. Moreover, Green was not limited to asserting claims based on actions taken by the receiver in an "official capacity," but, assuming the receiver was never correctly appointed, Green could assert claims against the receiver personally. (*Aviation Brake Systems*, *supra*, 133 Cal.App.3d at pp. 234–235.) In fact, in connection with the final accounting, Green raised objections and made the same claim as in this action: that the order confirming the receiver was void for lack of jurisdiction. He filed and withdrew a motion to vacate the confirmation order on the same grounds that the order was void, asserting the same facts now alleged in this new action. The foreclosure court overruled Green's objections in the foreclosure actions, approved the final report, discharged the receiver and dismissed the actions, maintaining jurisdiction over the receivership. Green filed an appeal from the order discharging Sweeney and Preferred. He could have pursued the claim that the confirmation order was void, but he abandoned the appeal. Since Green participated in the foreclosure actions, any objection he had to the actions of Sweeney and Preferred relating to management of the properties could have and should have been raised in the course of those actions; the orders in the underlying foreclosure actions are res judicata. Having had the opportunity in the underlying litigation, Green could not later file this independent action to address the receiver's liability in mismanaging the assets. The trial court properly sustained the demurrer and dismissed the action.

DISPOSITION

The judgment is affirmed. Defendants and respondents Richard Sweeney and Preferred Realty Advisors, Inc. are awarded their costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P.J.

SEIGLE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.